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United States
Circuit Court of Appeals
For the Ninth Circuit.

JAMES NATHAN LOWERY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED

OCT 10 1942

PAUL F. O'BRIEN,

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

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Seattle, Washington,
Attorney for Appellant.

MESSRS. J. CHARLES DENNIS and
G. D. HILE,

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Seattle, Washington,
Attorneys for Appellee.

United States District Court
 Western District of Washington
 Northern Division
 May, 1942, Term

No. 45709

UNITED STATES OF AMERICA,
 Plaintiff,

vs.

JAMES NATHAN LOWERY,
 Defendant.

INDICTMENT

(Sec. 2553a Internal Revenue Code)

Vio. Act of Dec. 17, 1914, as amended, and
 Vio. Narcotic Drugs Import and Export Act.

(Sec. 174, Title 21, U.S.C.A.)

United States of America
 Western District of Washington
 Northern Division—ss.

The grand jurors of the United States of America, being duly selected, impaneled, sworn and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present: [1*]

Count I.

(2553a I.R.C.—possession)

That James Nathan Lowery on the twenty-ninth

*Page numbering appearing at foot of page of original Transcript of Record.

day of March, in the year of Our Lord One Thousand Nine Hundred Forty-two, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, then and there being, did then and there knowingly, willfully, unlawfully, and feloniously, and not in the original stamped package, nor from the original stamped package, purchase sell, dispense and distribute a quantity, to wit: Fifty (50) ounces of a certain compound, manufacture, salt, derivative, and preparation of Opium, to wit: Opium Prepared for Smoking; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [2]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

Count II.

(174—21)

That James Nathan Lowery, hereinafter called the defendant, to wit: On or about the twenty-ninth day of March, 1942, at the City of Seattle, County of King, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Honorable Court, then and there being, did then and there violate the Act of February 9, 1909, as amended by the Act of May 26, 1922, in that he, the said defendant, did then and there willfully, unlawfully, knowingly, feloniously and fraudulently receive, conceal, buy, sell and facilitate the transportation and concealment

after importation of a certain derivative and preparation of Opium, to wit: Fifty (50) ounces of Opium Prepared for Smoking, which said preparation of opium, as the defendant then and there well knew had been imported into the United States contrary to law.

Against the peace and dignity of the United States of America and contrary to the form of the statute of the United States of America in such case made and provided.

J. CHARLES DENNIS

United States Attorney.

G. D. HILE

Assistant United States
Attorney. [3]

[Endorsed]: A true bill.

WENDELL P. HURLBUT,
Foreman

Bail, \$.....

J. CHARLES DENNIS

[Endorsed]: Presented to the Court by the Foreman of the Grand Jury in open Court, in the presence of the Grand Jury, and Filed in the U. S. District Court May 27, 1942.

JUDSON W. SHORETT,
Clerk

By LEE L. BRUFF,
Deputy. [3a]

[Title of District Court and Cause.]

PLEA—TRIAL DATE SET

Now on this 6th day of June, 1942, Gerald Shucklin, Asst. U. S. Attorney appearing for the Government and Albert D. Rosellini, attorney for the defendant appearing, this matter comes on before the Court for arraignment and taking the plea of defendant. The defendant is present in Court with his counsel, and declares his true name to be James Nathan Lowery. Defendant waives the reading of the Indictment. Defendant enters a plea of not guilty to Count I, as charged in the indictment. Defendant enters a plea of not guilty to Count II as charged in the indictment. Case set for trial June 30, 1942 at 10:00 A.M., end of calendar, for jury cases. [4]

[Title of District Court and Cause.]

MOTION AND AFFIDAVIT FOR SUPPRESSION OF EVIDENCE

State Comes Now the defendant above named and moves the Court for an order suppressing certain exhibits and evidence now improperly held by agents of the United States Treasury Department, Narcotics Division.

This motion is based upon the affidavits of Al-

bert D. Rosellini and James Nathan Lowery attached hereto.

ALBERT D. ROSELLINI

Attorney for Defendant

State of Washington:

County of King—ss.

Albert D. Rosellini, being first duly sworn, upon oath deposes and says: That he is the attorney for the defendant above named, and that he has consulted with said defendant, and investigated the facts in connection with the arrest of said defendant. That said arrest is illegal and that the exhibits and evidence secured from said defendant were illegally obtained by Narcotics Agents in that said Narcotic Agents did not have a search warrant or any other writ authorizing them to search the defendant, James Nathan Lowery, or any of his personal belongings, and that said agents did not have, and could not have had, any knowledge or information of the commission of any crime by the defendant James Nathan Lowery. That the defendant James Nathan Lowery was not committing any crime in their presence, and that the Narcotic Agents did not have any information concerning the possession of any narcotics or any [5] other property taxable under the United States laws, and that said search and seizure of the de-

defendant was in violation of the United States Federal Constitution, Articles V and XIV.

ALBERT D. ROSELLINI

Subscribed and sworn to before me this 30th day of June, 1942.

[Seal] THOS. MARSHALL

Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed Jul. 3, 1942. [6]

[Title of District Court and Cause.]

AFFIDAVIT OF JAMES NATHAN LOWERY

State of Washington
County of King—ss.

James Nathan Lowery, being first duly sworn, upon oath deposes and says: That he is the defendant in the above entitled action; that he is a resident of Seattle, King County, Washington; that at no time has he been convicted of any felonies. That the only convictions against him are two gambling charges on which he received fines of \$25.00 and \$50.00 respectively. That on March 30, 1942, about 1 o'clock A. M., he arrived at Boeing Field in the City of Seattle, on an airplane. That on getting off the plane, he took his grip and walked to the Boeing cab and handed the grip

to the cab driver. That at said time, three men came up to him and one of the men said, "F.B.I. narcotic agents, Sunny". That said party flashed a badge. That said men took his grip and led him away to their car, and took him to the Federal Court House, where his grip was opened. That at the time that the officers told him they were F.B.I. agents, affiant felt that he was under arrest, and was led away to the car under their custody. While in the car one agent asked affiant "How much have you in the bag". Affiant answered, "Ten." That affiant at no time went willingly with the officers, but he was given the impression that he was under arrest at the [7] *the* officers took his grip and told him they were F.B.I. agents. That said agents did not have a search warrant or any other warrant or writ authorizing them to search affiant or any of his belongings. That said agents did not have, and could not have had, any knowledge or information of the commission of any crime by affiant. That affiant was not committing any crime in the presence of said agents, and said agents did not have, nor could have had, any information concerning the possession of any narcotics or any other property taxable under the United States laws, and that said search and seizure of the defendant and his personal belongings was unreasonable and unlawful. Affiant came to Seattle in August, 1941, and left Seattle only twice, to-wit: November, 1941, to go to Montana for his

divorce, and again in January to go to Montana for his divorce.

JAMES NATHAN LOWERY

Subscribed and sworn to before me this 3rd day of July, 1942.

[Seal] ALBERT D. ROSELLINI

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed Jul. 3, 1942. [8]

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO DEFEND-
ANT'S MOTION TO SUPPRESS

United States of America
Western District of Washington
Northern Division—ss.

Donald R. Smith, being first duly sworn, on oath deposes and says: That he is a Narcotic Agent, United States Bureau of Narcotics, Treasury Department, stationed at Seattle, Washington, and that he makes this affidavit on behalf of the United States in opposition to defendant's motion to suppress evidence.

That affiant is familiar with the records and correspondence in the office of the Bureau of Narcotics at Seattle, Washington; that prior to the acts herein related he reviewed a letter in the files

of said Bureau received from the San Francisco office of the Bureau of Narcotics dated June 11, 1941, at Los Angeles, that the said defendant James Nathan Lowery was believed to be trafficking in drugs between California and Montana; that affiant knew that the said defendant resided in this district for approximately the past year.

That your affiant, while acting in his capacity as Narcotic Agent, received information which he believed and does believe was reliable from a confidential source upon [9] whom affiant depended in the past and whose information on prior occasions had been correct, that the defendant James Nathan Lowery had received a letter from one Tony Alvarado, living at F29 1a, 729 Ugarto, City of Juarez, State of Chihuahua, Mexico, and that the letter stated in effect the following:

“How are you?

I got your letter today. My wife went to get it. Don't come until you get tela. with price and everything. Price no trouble, I want to keep friendship”

Signed “TONY”.

and that said confidential source disclosed that the said James Nathan Lowery was going to make a trip South to obtain opium and that he would probably go by airplane. This was in March, 1942.

This same confidential source advised affiant on March 24, 1942, that the defendant James Nathan Lowery received a telegram from the said Tony

Alvarado, signed "Tony", which came from Mexico and stated as follows:

"I have ten carates good quality. Answer if you will come.

TONY".

Your affiant checked the Spanish definition of the word "carates" and found that it meant "liver spots or brown spots"; your affiant deduced from this that the said word was a code word between the correspondents meaning opium.

Your affiant through his investigation discovered that the defendant under the name of James Smith departed from Seattle by plane at 8:45 P.M. March 26, 1942, for El Paso, Texas, on a round-trip ticket; that El Paso, Texas, is just across the international border from Juarez, Mexico, the place where the telegram and letter came from. Affiant received information from the United Air Lines that the defendant James Nathan Lowery was booked for a return trip by [10] plane, which was scheduled to arrive at 12:10 on the morning of March 29, 1942, and which actually arrived at 12:55 that day.

In company with Narcotic Agent Henry L. Giordano, I went to Boeing Field Airport about the time of the arrival of the plane. I had previously seen Lowery and could recognize him. I saw him leave the plane, claim his baggage and proceed to the Air Lines limousine which carries passengers into the city. As Lowery took the bag which he was carrying over to the limousine, Narcotic Agent

Hain said "We are Federal Officers" and took the bag from the driver of the limousine, and Lowery voluntarily went with Hain, Narcotic Agent Giordano and Detective Lieutenant Belland of the Police Department and affiant over to the automobile of the Narcotic Bureau. In the car were the defendant Lowery, Agents Hain and Giordano and Detective Lieutenant Belland. Affiant then left and drove to the Narcotic Bureau office in the United States Court House. In the office, in the presence of District Supervisor A. M. Bangs of the Narcotic Bureau, and Detective Lieutenant Belland and Agents Hain and Giordano, the defendant opened his bag and handed me ten cans of smoking opium, seven cans were in a shaving kit and three were in a newspaper. The defendant Lowery stated that he obtained the opium in El Paso, Texas, for \$650.00.

(Signed) DONALD R. SMITH

Subscribed and sworn to before me this 2d day of July, 1942.

(Signed) TRUMAN EGGER

Deputy Clerk, U. S. District Court, Western District of Washington.

Copy of within received Jul. 3, 1942.

ALBERT D. ROSELLINI

M

[Endorsed]: Filed Jul. 3, 1942. [11]

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS

United States of America
Western District of Washington
Northern Division—ss.

A. M. Bangs, being first duly sworn, on oath deposes and says: That he is District Supervisor, Bureau of Narcotics, U. S. Treasury Department, at Seattle, Washington, for the states of Washington, Oregon, Idaho, Montana and Alaska, and that he makes this affidavit on behalf of the United States in opposition to defendant's motion to suppress evidence.

That I first learned about the defendant James Nathan Lowery in my official capacity in June, 1941, when I received an official letter from the San Francisco Narcotic office advising that an investigation conducted in Los Angeles, California, had very definitely indicated James Nathan Lowery to be engaged in narcotic activities between California and Montana, particularly Great Falls. I subsequently caused an investigation to be made in Great Falls by the Narcotic Officers stationed in Montana, and was advised as a result of that investigation that Lowery had been in Great Falls, Montana, but had departed and was believed to be in Seattle; subsequently, personal investigations and investigations by [12] officers working under my direction revealed that James Nathan Lowery

had come to Seattle about August, 1941, from Great Falls, and that he was making occasional trips away from Seattle and on such occasions it was generally believed by the persons with whom I discussed the matter, that he had gone to Southern California, Salt Lake City or Phoenix, Arizona, for narcotic drugs.

Late in January or early February, 1942, I learned from another source which I believe to be reliable, that this source believed himself to be in position to advise me when "Sunny" Lowery, as he was known to him, left Seattle for the South for the purpose of bringing back to Seattle smoking opium. That a short while later, Agent, Smith, whom I had assigned to work with this confidential source, advised me that the source had turned over to him excerpts of a letter which he, the source, had seen in the possession of Sunny Lowery; the excerpts read as follows:

"How are you?

I got your *your* letter today. My wife went to get it. Don't come until you get tela. with price and everything. Price no trouble, I want to keep friendship."

(Signed) "TONY".

Agent Smith delivered this excerpt to me and within the next two or three days I personally discussed this development with the confidential source, and he advised me that it was his belief that Sunny Lowery would very shortly depart for either El Paso or Juarez, Mexico, for the opium

which he assumed the writer was to obtain, and would probably go by airplane. This was early in March, 1942.

Later in March, about the 22d, I learned from the same confidential source and Agent Smith that Sunny Lowery had received a telegram from Juarez, Mexico, reading sub- [13] stantially as follows:

“I have ten carates good quality. Answer if you will come.

TONY”.

After a thorough discussion with the confidential source, I concluded that Sunny Lowery would shortly depart from Seattle and in anticipation of what I contacted the United Air Lines and instructed them to advise me in the event a colored male answering the general description which was furnished them booked passage for El Paso, Texas. On the evening of March 26th, I was advised by the United Air Lines that a colored male had departed from Boeing Air Field at 8:45 P.M., traveling under the name of James Smith, but that the Air Lines employees had noted that he carried a bag bearing the initials “J.N.L.”; that this person was traveling on a return ticket to El Paso. On March 28th, I was again advised by the United Air Lines officials that James Smith was on his way back to Seattle and would, unless he made different connections than originally planned, arrive in Seattle Sunday morning at 8:10 A.M. Because of the information from the Air

Lines Company, it was deemed advisable to cover all planes arriving in Seattle from Southern California beginning at 8:00 P.M. March 28, 1942. Pursuant to my instructions, Narcotic Agents Hain, Giordano and Smith and Detective Lieutenant Belland of the Police Department, covered the arrival of the air plane from Southern California at 8:00 P.M. and again at my direction, they covered the airplane which was scheduled to arrive at Boeing Air Field at 12:10 A.M. March 29, 1942. Shortly before 1:00 o'clock on the last mentioned date, I received a telephone call from Detective Belland advising me that they would shortly be in the office with Sunny Lowery. I immediately proceeded to the Narcotic Office [14] and there met the above named officers and the defendant herein. After preliminary greetings, I asked the defendant where he had been, to which he shrugged his shoulders and replied "Well, you know where I have been, you know all about it, why ask me." I then asked him what he had brought back with him, to which he replied "Ten cans" again shrugging his shoulders. I then asked him "Ten cans of What?" and he finally stated "Opium." Upon which he proceeded to open his bag and produced therefrom a shaving kit containing seven brass cans of opium and a newspaper package which he unwrapped and in which was found three tin cans of opium prepared for smoking. He was thereafter questioned and stated, among other things, that he had left Seattle forty-eight hours before, gone to El Paso,

Texas, and there contacted a Mexican known to him as "Albatross"; that the said Albatross had subsequently delivered to him on a street corner in El Paso, Texas, the ten cans of smoking opium in return for \$650.00, same being according to him at the rate of \$65.00 per tin.

(Signed) A. M. BANGS

Subscribed and sworn to before me this 3d day of July, 1942.

[Seal] (Signed) TRUMAN EGGER

Deputy Clerk, U. S. District Court, Western District of Washington.

Copy of within received Jul. 3, 1942 p. m.

ALBERT D. ROSELLINI

[Endorsed]: Filed Jul. 3, 1942. [15]

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS

United States of America
Western District of Washington
Northern Division—ss.

Gilbert T. Belland, being first duly sworn, on oath deposes and says: That he is a Detective Lieutenant with the Seattle Police Department, detailed with the Narcotic Squad, and that he makes this affidavit

on behalf of the United States in opposition to defendant's motion to suppress evidence.

That, having received reliable information from Agents of the Federal Narcotic Bureau in Seattle, affiant was assigned to cooperate with said officers in investigating the defendant James Nathan Lowery. Affiant received reliable information that the said defendant was in the act of transporting a quantity of opium from the Southern part of the United States to Seattle by plane and that the said defendant Lowery would arrive on the United States Air Lines plane at 12:10 A.M. March 29, 1942. The plane was late and arrived at 12:55 A.M. Affiant was with Narcotic Agent Martin Hain at the time; affiant saw defendant Lowery leave the plane, claim his baggage and proceed to the Air Lines limousine; Lowery turned his bag over to the driver of the [16] limousine, at which time Narcotic Agent Hain took the bag from the driver and gave the same to me, and Lowery went with Hain and myself to the car of the Narcotic Bureau. Present in the car were the defendant Lowery, Agents Hain and Giordano and affiant. Affiant placed the bag in the car. After we were in the car, Narcotic Agent Hain asked Lowery what he had in the bag. Lowery answered, "Well, you know what I have, I have the ten cans." We proceeded to the Narcotic Bureau office in the United States Court House; Giordano carried the bag into the Narcotic office. Present in the office were narcotic Agents Smith, Giordano and Hain, District Supervisor Bangs and affiant. Mr. Bangs asked Lowery

what he had in the bag, he said he had ten cans, Mr. Bangs asked "Ten cans of what?" Lowery answered "Opium." Lowery then opened the bag and took out ten cans of opium, seven of which were in a shaving kit and three in newspaper. Defendant admitted that he had obtained the ten cans of opium at El Paso, Texas, for \$650.00.

Affiant, together with Narcotic Agent Hain, had been checking on said defendant Lowery since the receipt of a letter by the Seattle Narcotic Bureau office from San Francisco that the defendant had been engaged in trafficking narcotics from California to Montana.

(Signed) GILBERT T. BELLAND

Subscribed and sworn to before me this 2nd day of July, 1942.

[Seal]

(Signed) E. M. ROSSER

Deputy Clerk, U. S. District
Court, Western District of
Washington.

Copy of within received July 3, 1942.

ALBERT D. ROSELLINI

R M

[Endorsed]: Filed Jul. 3, 1942. [17]

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS

United States of America
Western District of Washington
Northern Division—ss.

Henry L. Giordano, being first duly sworn, on oath deposes and says: That he is a Narcotic Agent, United States Bureau of Narcotics, Treasury Department, stationed at Seattle, Washington, and that he makes this affidavit on behalf of the United States in opposition to defendant's motion to suppress evidence.

That affiant is familiar with the records and correspondence in the office of the Bureau of Narcotics at Seattle, Washington; that prior to the acts herein related he reviewed a letter in the files of said Bureau received from the San Francisco office of the Bureau of Narcotics dated June 11, 1941, at Los Angeles, that the said defendant James Nathan Lowery was believed to be trafficking in drugs between California and Montana; that affiant knew that the said defendant resided in this district for approximately the past year.

That your affiant, while acting in his capacity as Narcotic Agent, received information from Narcotic Agent Donald R. Smith that the James Nathan Lowery had received a [18] letter from one Tony Alvarado, living at F29 1a, 729 Ugarto, City of Juarez, state of Chihuahua, Mexico, and that the letter stated in effect the following:

“How are you?

I got your letter today, My wife went to get it. Don't come until you get tela, with price and everything. Price no trouble. I want to keep friendship.”

(Signed) “TONY”.

and that said Narcotic Agent Donald R. Smith disclosed to affiant that he understood from a reliable confidential source that the said James Nathan Lowery was going to make a trip South to obtain opium and that he would probably go by airplane. This was in March, 1942.

Narcotic Agent Smith also advised me that he received information from the same reliable confidential source that the defendant James Nathan Lowery received a telegram from the said Tony Alvarado, signed “Tony”, which came from Mexico and stated as follows:

“I have ten carates good quality. Answer if you will come.

TONY”.

Your affiant checked with Donald R. Smith the Spanish definition of the word “carates” and found that it meant “liver spots or brown spots”, from which your affiant deduced that the said word was a code word between the correspondents meaning opium.

Your affiant through his investigation discovered that the defendant under the name of James Smith departed from Seattle, by plane at 8:45 P.M. March 26, 1942, for El Paso, Texas, on a round-trip ticket;

that El Paso, Texas, is just across the international border from Juarez, Mexico, the place where the telegram and letter came from. Affiant received information from the United Air Lines that the de- [19] fendant James Nathan Lowery was booked for a return trip by plane, which was scheduled to arrive at 12:10 on the morning of March 29, 1942, and which actually arrived at 12:55 that day.

In company with Narcotic Agent Donald R. Smith, I went to Boeing Field Airport about the time of the arrival of the plane; I saw the defendant Lowery leave the plane, claim his baggage and proceed to the Air Lines limousine which carries passengers into the city. As Lowery *took* the bag which he was carrying over to the limousine, Narcotic Agent Hain said "We are Federal Officers" and took the bag from the driver of the limousine, and Lowery voluntarily went with Hain, Detective Lieutenant Belland of the Police Department, Donald R. Smith and affiant over to the automobile of the Narcotic Bureau. In the car were the defendant Lowery, Agent Hain, Detective Lieutenant Belland and affiant. Belland placed the bag in the car. After we were in the car, Narcotic Agent Hain asked Lowery what he had in the bag. Lowery answered, "Well, you know what I have," and Hain said "What have you?" Lowery answered "I have ten cans." We proceeded to the Narcotic Bureau office in the United States Court House: affiant carried the bag into the Narcotic office. Present in the office were Narcotic

Agents Smith and Hain, District Supervisor Bangs, Belland and affiant. Mr. Bangs asked Lowery what he had in the bag, he said he had ten cans, Mr. Bangs asked "Ten cans of what?". Lowery answered "Opium." Lowery then opened the bag and took out ten cans of opium, seven of which were in a shaving kit and three in a newspaper.

HENRY L. GIORDANO

Subscribed and sworn to before me this 3d day [20] of July, 1942.

[Seal] (Signed) TRUMAN EGGER
Deputy Clerk, U. S. District Court, Western District of Washington.

Copy of within received Jul. 3, 1942.

ALBERT D. ROSELLINI
M

[Endorsed]: Filed Jul. 3, 1942. [21]

[Title of District Court and Cause.]

WAIVER OF TRIAL BY JURY AND REQUEST FOR TRIAL BY COURT WITHOUT JURY

The undersigned James Nathan Lowery, defendant in the above entitled case, hereby voluntarily waives his right to trial by jury and respectfully requests that the Court try his cause without jury.

This waiver is made with the advice, consent and approval of my attorney Albert D. Rosellini.

Signed in open court this 6th day of July, 1942.

(Signed) JAMES NATHAN LOWERY

This Waiver is executed by the defendant James Nathan Lowery with my consent and approval.

(Signed) ALBERT D. ROSELLINI
Attorney for Defendant.

[Endorsed]: Filed Jul. 6, 1942. [22]

[Title of District Court and Cause.]

TRIAL

Now on this 6th day of July, 1942, this cause comes on before the Court for trial and for hearing on defendant's motion for suppression of evidence. This motion is called argued and denied. On oral motion of Albert Rosellini, attorney for defendant who appears in Court, leave is granted to file waiver for trial by Jury on behalf of the defendant. The Court enters an order accepting waiver for trial by jury and proceeds without assistance of the jury. After disposing of the motion to suppress the evidence, the case is called by the Court for trial. The parties announce ready. The defendant is present in court with his counsel Albert D. Rosellini and Gerald Shucklin, Assistant United States Attorney appears for the Government. Donald R. Smith is sworn and testifies on behalf of the Government. Plaintiff's

exhibits 1, 2 and 3 are marked for identification. At 3:50 P.M., Court recesses for ten minutes. At 4:00 P.M., Court is again in session, all are present as before and the trial is resumed. At 4:30 P.M., all parties are excused in this case until 2:00 P.M., Tuesday, July 7, 1942.

Tuesday, July 7, 1942

(Trial Resumed)

Now on this 7th day of July, 1942, this cause comes on before the Court for further trial. Gerald Shucklin, Assistant United States Attorney appears for the Government and Attorney Albert D. Rosellini appears for the defendant. [23] All parties are ready to proceed. The defendant is present with his counsel Albert Rosellini. Hugo Ringstrom is sworn and testifies for the Government. Plaintiff's Exhibits 1, 2 and 3 are admitted in evidence. Gilbert Belland, Henry Giordano and A. M. Bangs' testimony, the government moves to dismiss count I of the Indictment. No objections. Motion to dismiss count I granted. At 4:00 P.M., Government rests. The defendant, through his counsel, Albert Rosellini renews his motion to suppress the evidence. Motion denied. Mr. Rosellini moves to dismiss the case. Motion denied. The defendant offers no testimony and rests. The Court announces its oral decision, finds the defendant guilty on Count II. The court sets July 20, 1942 at 10:00 A.M. for time hearing any pending motions and for sentence. [24]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes Now the defendant, James Nathan Lowery, and moves the Court for judgment notwithstanding the oral decision of the Court, or, in the alternative, for a new trial, upon the following ground:

1. Irregularity in the proceedings of the Court and adverse party, or abuse of discretion by which the defendant was prevented from having a fair trial.

2. Misconduct of the prevailing party.

3. Accident and surprise which ordinary prudence could not have guarded against.

4. Newly discovered evidence material for the defendant, that could not have been discovered with reasonable diligence and produced at the trial.

5. Insufficiency of the evidence to justify the decision, or that it is against law.

6. Error of law occurring at the trial, and excepted to by the defendant.

Dated: July 9, 1942.

ALBERT D. ROSELLINI

Attorney for Defendant,

1111 Smith Tower,

Seattle, Washington.

Received a copy of the within motion this 9th day of July, 1942.

J. CHARLES DENNIS

Attorney

[Endorsed]: Filed Jul 9-1942. [25]

[Title of District Court and Cause.]

MOTION FOR DISMISSAL OF ACTION

Comes Now the defendant, James Nathan Lowery, and moves the Court for an order dismissing the above entitled cause, and all the proceedings therein, on the ground and for the reason that the indictment herein obtained and the trial of the cause herein are based upon an unlawful search and seizure of the person of the defendant, in violation of the Fourth and Fifth *Aments* of the United States Constitution, as is more fully set forth in the affidavits, files and records in this cause.

ALBERT D. ROSELLINI
Attorney for Defendant.

Received a copy of the within Motion this 9th day of July 1942.

J. CHARLES DENNIS
Attorney

[Endorsed]: Filed Jul 9-1942. [26]

[Title of District Court and Cause.]

MOTION FOR ARREST OF JUDGMENT AND
STAY OF PROCEEDINGS

Comes Now the defendant, James Nathan Lowery, by and through his attorney, Albert D. Rosellini,

and moves the Court for an arrest of judgment and stay of proceedings in the above entitled cause.

This Motion is based upon the files and records herein.

ALBERT D. ROSELLINI

Attorney for Defendant.

Received a copy of the within Motion this 9th day of July 1942.

J. CHARLES DENNIS

Attorney for U. S.

[Endorsed]: Filed Jul 9-1942. [27]

[Title of District Court and Cause.]

SENTENCE PRONOUNCED

Now on this 20th day of July, 1942, this cause comes on before the Court for hearing on motion for arrest of judgment and stay of proceedings; motion of dismissal; motion for new trial; and sentence of defendant. Gerald Shucklin, Asst. U. S. Atty. appears for the Government. Attorney Albert Rosellini appears for the defendant. The defendant is present with his counsel. Motion for arrest of judgment and stay of proceedings is called and argued and denied. Motion of Dismissal is denied. Motion for new trial is denied. Sentence is pronounced. Defendant is remanded in custody of the U. S. Marshal. Later: Written judgment and sentence, the terms of which are as orally pronounced by the Court, is signed. Mr. Rosellini gives oral notice of appeal. On recommendation of Government attor-

ney, appeal bond is fixed in sum of \$5000.00. The court orders said bond to be a surety bond. [28]

United States District Court
Western District of Washington
Northern Division

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES NATHAN LOWERY,
Defendant.

JUDGMENT AND SENTENCE

Comes now on this 20th day of July, 1942, the said defendant James Nathan Lowery into open court for sentence, with Albert D. Rosellini, his attorney, and said defendant being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be imposed and judgment had against him, and he nothing says, save as he before hath said.

Wherefore, by reason of the law and the premises, the defendant having waived trial by jury and requested that the Court try the cause without jury, and the Court having found the defendant guilty as charged in Count II, it is

Considered, Ordered and Adjudged by the Court that said defendant James Nathan Lowery is guilty

as charged in Count II of the Indictment herein, and that on Count II he be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment in the United States Public Health Service Hospital, Fort Worth, Texas, or in such other like institution as the Attorney General of the United States or his authorized representative may by law designate, for the period of Twenty-one (21) Months, and further, that said defendant pay a fine to the United States of America in the sum of [29] Five Hundred (\$500.00) Dollars and stand committed until said fine is paid.

And the said defendant is hereby remanded into the custody of the United States Marshal for this District for delivery to the Medical Officer in Charge, United States Public Health Service Hospital, Fort Worth, Texas, for the purpose of executing said sentence. This judgment and sentence for all purposes shall take the place of a commitment, and be recognized by the Warden or Keeper of any Federal Penal Institution as such.

Done in Open Court this 20th day of July, 1942.

JOHN C. BOWEN,

United States District Judge.

Presented by:

GERALD SHUCKLIN,

Asst. United States Attorney.

Violation of Section 174, Title 21, U.S.C.A. (Narcotic Drugs Import & Export Act.)

[Endorsed]: Filed July 20, 1942. [30]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant:

JAMES NATHAN LOWERY

727-28th South

Seattle, Washington

Name and address of appellant's attorney:

ALBERT D. ROSELLINI

1111 Smith Tower

Seattle, Washington

Offense: Violation of the Narcotic Drugs Import and Export Act. (Sec. 174, Title 21, U.S.C.A.)

Date of Judgment: July 20, 1942.

Brief description of judgment or sentence:

That the defendant is guilty of the offense charged in Count II of the Indictment and that he be committed and sentenced for imprisonment in the United States Public Health Service Hospital, Fort Worth, Texas, for twenty-one (21) months, and that he pay a fine in the sum of Five Hundred (\$500.00) Dollars and stand committed until said fine is paid.

Name of prison where now confined if not on bail:
King County Jail.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for

the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

Dated: July 23, 1942.

Copy received July 23, 1942.

JAMES NATHAN LOWERY,
Appellant.

J. CHARLES DENNIS,
U. S. Atty.

By S. RISE. [31]

Grounds of appeal:

1. That the court failed to grant defendant's motion to suppress the evidence and exhibits in this case, which motion was based on the ground that there had been an unlawful search and seizure of the person and property of the defendant.

2. Error of the court in refusing on cross-examination of the government witnesses to allow said witnesses to reveal the name of the informer.

[Endorsed]: Filed Jul. 23, 1942. [32]

[Title of District Court and Cause.]

STATEMENT OF POINTS RAISED
ON APPEAL

To: The Clerk of the Above Entitled Court, and
to the Attorneys for the Appellee:

You and each of you will please take notice that the Appellant will rely on the following points in his appeal herein:

1. The denial of Appellant's motion to suppress the evidence with reference to the narcotics, on the ground and for the reason that the evidence was obtained by means of an unlawful search and seizure of the person and property of the Appellant.

2. The admission of evidence with respect to the narcotics seized, on the ground that the same were seized by means of an unlawful search and seizure.

3. The denial of the challenge to the sufficiency of the evidence on the ground that all the evidence introduced at the trial was based on an unlawful search and seizure.

ALBERT D. ROSELLINI,
Attorney for Appellant.

Office and Post Office Address: 1111 Smith Tower,
Seattle, Washington.

Copy Received, Aug. 31, 1942.

GERALD SHUCKLIN,
Asst. United States Attorney.

[Endorsed]: Filed Aug. 31, 1942. [33]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT
OF RECORD

To the Clerk of the Above Entitled Court:

You are hereby requested to make a transcript of the record in the above entitled cause and transmit

the same to the United States Circuit Court of Appeals for the Ninth Circuit, and to include in such transcript of record the following:

1. Indictment;
2. Arraignment and plea;
3. Motion to suppress;
4. Affidavit on motion to suppress;
5. Order denying motion to suppress;
6. Court's decision;
7. Motion for new trial; Motion for Dismissal of Action; Motion for Arrest of Judgment and Stay of proceedings;
8. Order denying motion for new trial; Order denying Motion for Dismissal of Action; Order denying Motion for Arrest of Judgment and Stay of Proceedings;
9. Judgment and Sentence;
10. Notice of Appeal;
11. Assignments of Error; [34]
12. Praeceptum.

ALBERT D. ROSELLINI,

Attorney for Defendant and
Appellant.

Received copy of the within Praeceptum this 31 day of August, 1942.

G. D. HILE,

Assistant United States Attorney. Attorney for plaintiff and Appellee.

[Endorsed]: Filed Aug. 31, 1942. [35]

[Title of District Court and Cause.]

GOVERNMENT'S PRAECIPE FOR ADDITIONAL TRANSCRIPT OF THE RECORD

To the Clerk of the Above-Entitled Court:

In addition to the matters requested by the defendant's Praecipe herein, please include in the transcript of the record on appeal the following:

1. Affidavits in opposition to the defendant's Motion to Suppress, namely, that of:
Donald M. Smith
Gilbert T. Belland
Henry L. Giordano
A. M. Bangs
2. Waiver of Trial by Jury executed by the defendant.
3. Defendant's Oral Notice of Appeal of July 20, 1942, and this Praecipe.

J. CHARLES DENNIS,
United States Attorney.

G. D. HILE,
Assistant U. S. Attorney.
Attorneys for the United
States, Plaintiff and Appellee.

Received copy of the within Praecipe this 8th day of September, 1942.

ALBERT D. ROSELLINI,
Attorney for Defendant and Appellant.

[Endorsed]: Filed Sep. 9, 1942. [36]

United States District Court
Western District of Washington
Northern Division

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, Judson W. Shorett, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 36, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecepe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that I transmit herewith as part of the record on appeal in this cause the original Bill of Exceptions and Assignments of Error filed in the cause.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or re-

turn to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Act of Feb. 11, 1925)
for making record, certificate or return,

| | |
|---------------------------------------|---------|
| 50 folios at 15c | \$ 7.50 |
| 25 folios at 5c | 1.25 |
| Appeal fee | 5.00 |
| Certificate of Clerk to Transcript... | .50 |
| | <hr/> |
| | \$14.25 |

I hereby certify that the above amount has been paid to me by the attorney for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 14th day of September, 1942.

JUDSON W. SHORETT,
Clerk.

By E. M. ROSSER,
Deputy.

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be It Remembered that heretofore, to-wit: on the 6th day of July, A. D. 1942, at the hour of 10:00 o'clock a. m. of said day, this cause came on for hearing in the above entitled court before the Honorable John C. Bowen, Judge of said Court, sitting

without a jury, whereupon the following proceedings were had and testimony taken, to-wit:

Appearances:

J. Charles Dennis, United States Attorney, by Gerald Shucklin, Esq., Assistant United States Attorney;

Albert D. Rosellini, Esq., attorney for the defendant.

Whereupon the above-entitled cause came on for hearing on a motion to suppress, which motion was argued by counsel for the plaintiff and by counsel for the defendant, and was by the Court overruled; to which ruling of the Court, by his counsel, the defendant then and there duly excepted. Whereupon the trial of the said cause ensued as follows:

TESTIMONY

DONALD R. SMITH,

being called as a witness on behalf of the plaintiff,
having been first duly sworn, testified as follows: (3)

Direct Examination

By Mr. Shucklin:

My name is Donald R. Smith and I reside in Seattle, and am a narcotic agent with the Federal Bureau of Narcotics. I have held that position since last August. I met James Nathan Lowery [1*] the defendant in the course of my duties and I see him in the court room.

Mr. Rosellini: I will object, if the court, please, to any testimony with reference to this search and seizure of the defendant on the ground that it was an unlawful search and seizure.

The Court: Overruled.

Mr. Rosellini: Exception.

The Court: Allowed.

Mr. Rosellini: May we consider that this objection goes to all of this testimony, Your Honor?

The Court: Is that agreeable?

Mr. Shucklin: That is agreeable.

The Court: The Court approves, and it may be so understood.

Narcotic Agent Giordano and myself went to the King County Airport and awaited the plane which was to arrive at 12:10 a. m. on the morning of March 29, 1942. We met Narcotic Agent Hain

*Page numbering appearing at foot of page of original Reporter's Transcript.

(Testimony of Donald R. Smith.)

and Officer Belland of the Seattle Police Department at the airport. At 12:55 the plane arrived and the defendant Lowery landed from the plane. We saw him leave the plane, he looked around in both directions as he got off the plane and he proceeded toward and entered the depot. He waited at the luggage counter, claimed his bag, and proceeded outside to the limousine that the airline operates to take passengers into town. He went to the back of the limousine and handed his bag to the driver. At that time, Agent Hain came up and said, "Federal officers—Take the bag."

Lowery went voluntarily with Giordano, Hain, Belland and myself over to Agent Hain's car, which was a Narcotics Bureau car. There were two cars, a sedan and a coupe which Giordano and myself had driven up there. The other three officers got into Hain's car with Lowery and went to the United States [2] Court House. The bag was in the car with Lowery and the other officers. We all went into the Court House to our offices and met District Supervisor Bangs. The defendant Lowery opened the grip and gave me the narcotics, seven cans of which were in a small shaving kit and three cans of a different shape were wrapped in newspaper, the defendant stating, in the presence of myself, Supervisor Bangs, Agent Hain, Agent Giordano and Officer Belland, that he had obtained these cans on his trip to El Paso and paid \$65.00 a tin for them. Plaintiff's Exhibit No. 1 for identification, consisting of seven tins, I saw in the de-

(Testimony of Donald R. Smith.)

defendant's shaving kit and Lowery handed those to me. Plaintiff's Exhibit No. 2 for identification, consisting of three tins, were wrapped in a newspaper and were also in the grip. Lowery handed them to me. The contents of plaintiff's Exhibit No. 3 for identification had leaked out inside the grip, the substance being black, as it appears on the exhibit. I only looked in Exhibit 3 and not in any of the others. Exhibits 1, 2, and 3 were initialed for identification by all the officers except Mr. Bangs, and delivered by myself to the United States Officer, Ringstrom, for safekeeping. The exhibits were in no way disturbed as to contents and when I handed them to Ringstrom their condition was the same as when Lowery handed them to me.

Cross-Examination

By Mr. Rosellini:

I'm twenty-seven years of age, and worked for the Government for two years. Since August I have been in the Narcotics Division as an agent. Prior to that I was Mr. Bang's clerk. The first time I heard of Mr. Lowery was in a report on June 11, 1941, by an officer to his District Supervisor in the California Division, which report had in [3] turn been forwarded to our office. The report stated that Lowery was suspected of traffic in narcotics between California and Montana and gave a description of his personal baggage and license number and a picture of him. So far as I know, we had no previous information on Mr. Lowery. After June, 1941, I received some information about

(Testimony of Donald R. Smith.)

Lowery in the early part of February, 1942, from a man who was working for me, to the effect that Lowery had been using or selling narcotic drugs. This man was a confidential informant and is in Seattle.

Q. And what is his name?

Mr. Shucklin: I object to any testimony in reference to the informer's name, because it is a confidential source of information and against public policy to disclose the information, as it would expose the informer to probable evil consequences.

Mr. Rosellini: Of course, that is just surmise.

(Further argument and citing of cases by counsel.)

The Court: I have had that question before me before and I have, I think, in every case, sustained an objection as to the giving of the name. You may ask him other questions touching the matter and make such other inquiries as will not result in disclosing the name of the informer. The objection is sustained.

Mr. Rosellini: May we have an exception?

The Court: You have an exception, and you may inquire further in other respects as to the basis of probable cause.

This informer has been working for me 8 or 9 months to date. About the time Lowery was apprehended he had worked for me about six months. This informer is usually paid on a reward basis, based on the importance of the case and when [4]

(Testimony of Donald R. Smith.)

it is completed. He was paid \$150.00 after the arrest of Lowery. That is the total compensation he received for this case. He had been used by this office on one other investigation. I had never completed before but one case with him. However, I have used him on other investigations. I have never used this informer in any other case where we have secured the conviction of any defendant. I have used him to secure the arrest of Ephriam Blackmann. Blackmann's arrest took place the early part of June, 1942, which was after the Lowery arrest, but the evidence in that case was made in February. I never secured the arrest of anyone prior to the Lowery case on the basis of information furnished me by the same informer. He gave me no information on any other cases as distinguished from investigation, prior to March 29, 1942. I had known this informer six months prior to Lowery's arrest. He is in the same business as the defendant, that is, the gambling business. I do not know if the informer deals in narcotics or whether he has been arrested in connection with narcotics, but he is not an addict; to my knowledge he has not been arrested for violation of any law. The informer did not show me the letter which I set out in my affidavit; but told me the approximate contents of the letter; he did not show me the telegram set forth in my affidavit, but told me of it. Lowery went voluntarily with us in the car after we told him we were federal narcotic agents. I was not

(Testimony of Donald R. Smith.)

armed at that time. I do not believe the other officers were armed. What I mean to say by going voluntarily is that he did not offer any physical or verbal resistance. Witness excused.

HUGO RINGSTROM

was called as a witness on behalf of the plaintiff, having been first duly sworn, and testified as follows: [5]

Direct Examination

By Mr. Shucklin:

I have been a chemist for the Alcohol Tax Unit for 19 years and have done work for the Federal Narcotics Bureau over that entire period. I have a Master's degree in chemistry from the University of Minnesota and have had 19 years' experience in analyzing narcotics and opium. I have had Exhibits 1, 2 and 3 for identification in my possession ever since Narcotic Agents Don Smith and Henry Giordano delivered them to me, and they are in the same condition as when delivered to me except for the quantity taken for analysis. I analyzed the substance in Exhibits 1, 2, and 3 for identification and found it to be smoking opium. The quantity was approximately 50 ounces.

Mr. Shucklin: We offer in evidence at this time Government's Exhibits 1, 2 and 3 for identification.

Mr. Rosellini: If the Court please, we object to

(Testimony of Hugo Ringstrom.)

the introduction of this evidence, or any testimony with respect to this on the ground and for the reason that the same were obtained by means of an unlawful search and seizure, in violation of the defendant's constitutional rights.

The Court: Objection overruled.

(Cans—plaintiff's Exhibits 1, 2 and 3—received in evidence.)

Mr. Rosellini: May we have an exception, if Your Honor please, for the record?

The Court: Exception allowed.

Mr. Rosellini: At this time I would like to move to strike the witness' testimony on the same ground that we based our exception on, Your Honor.

The Court: Motion denied.

Mr. Rosellini: And I would like an exception.

[6]

The Court: Exception allowed.

Witness excused.

GILBERT T. BELLAND

was called as a witness on behalf of the plaintiff, having been first duly sworn, and testified as follows:

Direct Examination

By Mr. Shucklin:

My name is Gilbert T. Belland, resident of Seattle, Detective Lieutenant of the Narcotic Squad,

(Testimony of Gilbert T. Belland.)

Seattle Police Department. I have been with the Police Department since 1921 and have been in charge of the Narcotic Squad since July 1, 1934. I went to Boeing Airfield on the evening of March 28, 1942, with Federal Narcotic Agent Hain. I saw the defendant Lowery come off a plane the morning of March 29, 1942. He secured his baggage and went to the airport bus and handed his bag to the driver of the bus and was then taken by the Federal Narcotic Agent Hain and myself to the car that I came down in. Narcotic Agents Giordano and Don Smith were also there. I secured the bag and placed it in the automobile. Lowery sat with me in the back seat and we went up to the Court House, to the Federal Narcotics Office. Hain, Giordano, Lowery and myself were in the car. As we were leaving the airport Hain asked the defendant what he had in the bag. The defendant said, "Well, you know what I've got in the bag. I've got ten cans." When Bangs arrived, he asked the defendant what he had in his bag and Lowery said "I have the ten cans." Then Bangs asked him of what, and then the defendant said "Opium," and the defendant opened the bag. Lowery stated he had purchased the cans from a Mexican in El Paso that he met on the corner and paid \$650.00 for them. I may have left the room before Bangs had finished [7] talking to Lowery. Government's Exhibits 1, 2, and 3 all came out of the bag Lowery opened, and were intialed by me.

(Testimony of Gilbert T. Belland.)

Mr. Rosellini: At this time, if the Court please, I move to strike the testimony of this witness with reference to the narcotics, the grip, and the contents of the grip, on the same ground that I heretofore urged, and that is, that the same was obtained through means of an unlawful search and seizure of the defendant, in violation of his constitutional rights.

The Court: Motion denied, and your exception is allowed.

Cross-Examination

By Mr. Rosellini:

It is my duty as head of the Narcotics Division of the Seattle Police Department to keep a record or try to investigate narcotic addicts and narcotic peddlers and secure their arrest if possible. I try to keep a record of people who have a reputation of being in that sort of business either as a peddler or addict. Lowery first came to my attention on or about October 1941 when Agent Martin Hain had a letter which we were assigned to investigate, in which the defendant's name was mentioned as supposedly being engaged in narcotics between the southern part of the United States and Montana. I saw a carbon copy or form of that letter, which I presume is a copy of the letter that Officer Smith testified to. That is the only information that I had about the defendant. Federal Officer Hain and myself attempted to obtain what information we could concerning Lowery. Our investigation did not dis-

(Testimony of Gilbert T. Belland.)

close anything with reference to Lowery traffick-
ing in narcotics, being associated with narcotic
agents or having a reputation [8] of being engaged
in narcotic traffic. Mr. Bangs explained the case to
me regarding the defendant having left Seattle and
supposedly would leave El Paso and that he was
going to arrive with a quantity of opium around the
25th and 26th of March. After that, for the first
time I had my first contact with Agents Smith and
Giordano on the case. This is the first specific infor-
mation I received about the defendant trafficking
in narcotics. My investigation did not show whether
the defendant was making frequent trips outside of
the state. I never talked to the informer prior to
Lowery's arrest, and do not know who the informer
was. I have reasonable belief as to who the informer
was.

The witness was asked by Mr. Rosellini
whether the party that he believed was the
informer in the case had a police record. Ob-
jection made by Mr. Shucklin was sustained
by the Court, and an exception taken to the
Court's ruling by Mr. Rosellini was allowed.

We went to the Airport for the purpose of arrest-
ing the defendant if he showed up under those
circumstances and had that bag. The only infor-
mation that I had was the information that Mr.
Bangs conveyed to me that he had been informed
by someone of whose identity I was not sure, plus
the letter back in October sent from Los Angeles

(Testimony of Gilbert T. Belland.)

office stating that the defendant was suspected of being in narcotic traffic. I had no personal information as to Lowery trafficking in narcotics or taking this particular trip. I was armed at the time of the arrest. I was about 15 or 20 feet away from Hain when he reached over and grabbed the bag and turned around directly to the defendant. I just surmised that he was placed under arrest and I stepped out alongside of him and kept him back, and Hain was on the other side and we marched him off to the car. He was distinctly told not to reach for his pockets. Witness excused. [9]

HENRY L. GIORDANO

was called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Shucklin:

I reside in Seattle, and have been with the Narcotic Bureau a little over a year. I went to Boeing Airfield on the evening of March 28, 1942, with Agent Smith, and saw the defendant in the early morning of March 29, 1942. I saw Lowery leave the plane, go to the station, claim his bag and go over to the limousine. As Lowery handed his bag to the driver, Agent Hain stepped up and said "We are Federal officers" and took the bag from the driver and handed it to Officer Belland.

(Testimony of Henry L. Giordano.)

As we were leaving the airport Agent Hain asked Lowery what he had in the bag and Lowery said, "You know what I have," and Hain said, "No, I don't know what you have got," and Lowery answered, "Ten cans." Lowery also said, "You got me now. There is no use asking any questions." At the Court House, Mr. Bangs asked Lowery what he had and Lowery said, "Ten cans." Bangs said, "Of what?" and Lowery answered, "Opium." Lowery opened the bag and took from it a small military case and handed it to Agent Smith and the case was then found to contain seven cans, which are marked as Government's Exhibits 1 and 3, which all contained opium. Lowery also took from the bag a small bundle and it was then found to contain three cans of opium, which is marked as Government's Exhibit 2.

Cross Examination

By Mr. Rosellini:

Prior to being a narcotic agent, I was a pharmacist. I have been a narcotic agent for two years and in the course of my duties—about August 1941—I saw a copy of the [10] letter from the San Francisco office dated June 11, 1941, which stated that Lowery was engaged in narcotic traffic between California and Montana and that he was associating with known narcotic addicts. I made an investigation, which did not disclose that he was trafficking in narcotics between California and Mon-

(Testimony of Henry L. Giordano.)

tana. The only information I had about Lowery was from the letter of June 11, 1941, which information was never substantiated so far as I know. I did find out through the information given to Agent Smith by his informer that Lowery had made two trips to Montana and was contemplating a trip to the southern part of the United States. I never found any evidence of the truth of the suspicion set forth in the letter of June 11, 1941. The next information I had was from Agent Smith about the first of March, 1942, to the effect that Lowery had received a letter from one Tony Alvarado. I did not see the letter but saw only what the informer had copied from it. I was just introduced to the informer and never discussed Lowery with him. I had never used this particular informer, but Agent Smith advised me that he had used him. The only information I had as to the informer's reliability was that given to me by Agent Smith. The only thing Smith told me about this informer was that he was a reliable informer. He did not go into details telling me what kind of a man he was, what his occupation was, or whether he was an addict. About March 26 I received from Mr. Bangs information that the defendant had gone to El Paso. That was three days before the arrest and we made arrangements to meet the plane so that we could find out what he had in his baggage and arrest him if he had narcotics in his baggage. We were not

(Testimony of Henry L. Giordano.)

sure but were fairly certain he had narcotics at that time, but naturally did not want to arrest him unless he had the [11] narcotics. That is why we did not get a warrant for his arrest. We went there with the idea of arresting him if he had narcotics. I was armed.

(Witness excused.)

A. M. BANGS

was called as a witness on behalf of the Plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Shucklin:

I reside in Seattle and have charge of the Fifteenth Narcotic District, which includes Washington, Oregon, Idaho, Montana, and the Territory of Alaska. I saw the defendant Lowery early in the morning of March 29, 1942, at my office in the presence of the other officers as before testified. I asked him to open his suitcase and he did, and he also produced Government's Exhibits 1, 2, and 3. I asked him where he had been and he told me he had been to El Paso and on asking him, he said he had brought back ten cans of opium. We talked about his trip to El Paso and he told me he left Seattle Thursday night, March 26, 1942; that he arrived in El Paso on Friday

(Testimony of A. M. Bangs.)

and remained there until Saturday morning, the 28th; that in El Paso he met a Mexican whom he knows as "Alkatros" who handed him ten cans of opium in an automobile on a street corner in El Paso. He said he paid Alkatros \$650.00. I asked him about a certain Mexican and he denied that he had contacted him, saying that he, Lowery, had called the Mexican at Juarez, Mexico, but had been unable to contact him. I told Lowery the best thing for him to do was to get himself a lawyer and he said "What is the use of getting an attorney? You've got me red-handed and all I can do is plead guilty [12] and get it over with." Agent Hain is on detail in Minneapolis and it was not practical to get him here for the trial.

Cross-Examination

By Mr. Rosellini:

The first I heard of the defendant was sometime in June, 1941, when I received a letter from the District Supervisor in San Francisco. That is the same letter that the other witnesses have testified to. The letter was written in Los Angeles, and then submitted to San Francisco, then transmitted to me. The letter advised that Lowery was supposed to be engaged in narcotic traffic between California and Montana, particularly Great Falls. I caused an investigation to be made by the Narcotic office in Montana. By the time of the investigation the defendant had already left.

(Testimony of A. M. Bangs.)

I couldn't say whether he was engaged in narcotic traffic there. The investigation there didn't disclose he had been so engaged. I was never able to prove that any occasional trips that he has taken outside of the state were for the purpose of trafficking in narcotics. I believe that he has been arrested or found to be dealing in narcotics by the Seattle Police Department. I did not know my informant prior to January or February of 1942. I had never used him before, but I knew that Agent Smith had. I met him through Agent Smith, who had authority to receive information from informers. There was no hiring—we take information from anyone who can give it. It is understood that the informer receives pay for his efforts. The informer was used on the Blackmann case, in which the arrest was made after the Lowery arrest. Prior to March, 1942, the informer had never been used in an investigation which resulted in the arrest and conviction of a defendant prior to [13] the Lowery case, but he has been used in investigations and made purchases. I know that the informer is about 40 years of age; I do not know if he has a police record and have made no effort to find out. I relied on the information of the informer in order to secure the arrest of this defendant. I didn't know anything about the informer's activities at that time, except what information he had furnished me and I had been able to verify it as absolutely correct. I was furnished infor-

(Testimony of A. M. Bangs.)

mation about two defendants from this informer prior to March 29, 1942, which defendants have not as yet been arrested. I knew that the information and evidence that I received through the informer about these two defendants that have not been arrested was correct. We do not expect to arrest them for several months. The informer is not a drug addict to my knowledge. We generally check up on informers whenever we can. The Federal officer who sent this informer to me more or less vouched for him.

I saw the excerpts of the letter that was turned over to Agent Smith by the informer and I discussed the same with the informer. The informer did not tell me how he got the information or how he got the letter. I do not know how the letter was addressed or to whom it was addressed. I didn't even see the return address. I knew the informer was reliable and he told me he had seen the letter. He told me that the letter was addressed to the defendant. As I recall, it was this name: "Sonny Lowery." He told me he saw the letter in Room 22 of the Rainier Apartments and I knew from my investigation that Lowery had a room in the Rainier Hotel or Apartment, and that it was 22. I received information on March 26th from the Airline Company about the trip to El Paso by a person answering Lowery's description and I was advised by the United Air Lines after a person answering the defendant's descrip-

(Testimony of A. M. Bangs.)

tion left El Paso, Texas. This person was traveling under the name of James Smith though his bag was initialed J.N.L. [14] As I recall, it was Saturday the 28th. On March 26th, and again on March 28th, I was satisfied that this man was acting for narcotic agents, but I made no attempt to procure a warrant for his arrest or for his search. I instructed my men to go down to the airport and if he returned on either one of the planes that he would return on, to question him or talk to him and find out what he was bringing back with him. I felt I had adequate information in my possession to establish probable cause for taking him into custody when he arrived. Questioning and arrest usually come simultaneously.

(Witness excused.)

Mr. Shucklin moved to dismiss Count I. and elected to proceed on Count II. The motion was granted by the Court and Count I. was ordered dismissed on the Government's Motion.

The Government rests.

The Court: The plaintiff rests. The defendant may now proceed.

Mr. Rosellini: If the Court please, at this time we wish to renew our motion for the suppression of the evidence in this case on the same grounds, of course, that it was obtained through unlawful search and seizure.

I am not going to take any extended time, but I should like to point out one or two facts that the testimony here revealed, on cross-examination and direct examination of the Government's witnesses, which I think substantiates our position that there was no probable cause for the arrest.

In the first place——,

(There was further argument.)

The Court: The motion which has been urged to suppress the evidence is denied, and the challenge to the sufficiency of the evidence is overruled, and the motion to dismiss is [15] likewise denied.

Mr. Rosellini: May I have an exception to the denial of the motions, Your Honor?

The Court: Yes, you may have exceptions to the denial of the motion to suppress the evidence and the overruling of the motion to the challenge of the sufficiency of the evidence.

Mr. Rosellini: The defendant is not going to offer any testimony, Your Honor.

The Court: Does the defendant now rest?

Mr. Rosellini: The defendant rests.

The Court: Is there any further testimony?

Mr. Shucklin: No further testimony, Your Honor.

The Court: Very well.

Mr. Shucklin: I am willing to submit the case, Your Honor.

Mr. Rosellini: I am willing to submit the case also, Your Honor.

(There was a discussion off the record, after which the following occurred.)

Mr. Rosellini: We have nothing further to say, except at the end of the argument of both the Government and the defense, we now renew our motions which we have just made, which the Court has overruled and has allowed exceptions.

The Court: Those motions are denied, and the exception requested is allowed in each instance.

By the Court: (After discussing the facts of the case) For these reasons, I think that the Court must find and decide that, on the proof offered here, the defendant is guilty as charged in Count Two and that is the decision of the Court. [16]

The correctness, completeness and sufficiency of the foregoing Bill of Exceptions are hereby approved.

J. CHARLES DENNIS
United States Attorney
G. D. HILE
Assistant United States
Attorney
ALBERT D. ROSELLINI
Counsel for Defendant

[Endorsed]: Filed Sep. 8, 1942. [17]

[Title of District Court and Cause.]

CERTIFICATE

United States of America
State of Washington
County of King—ss.

I, John C. Bowen, Judge of the District Court of the United States for the Western District of Washington, Northern Division, and Judge before whom the foregoing cause entitled: "United States of America, Plaintiff, versus James Nathan Lowery, Defendant", was heard and tried do hereby certify that the matters and proceedings embodied in the foregoing Bill of Exceptions are matters and proceedings occurring in the said cause, and that the same are hereby made a part of the record therein; and I further certify that the said Bill of Exceptions, together with all of the exhibits admitted and on file in said cause, and attached to said Bill of Exceptions, contains all the material facts, matters, and proceedings heretofore occurring in said causes and not already a part of the record therein; and said Bill of Exceptions and the exhibits attached thereto, are hereby made a part of the record in said causes, the Clerk of the Court being hereby instructed to attach all the exhibits thereto.

Counsel for the respective parties being present and concurring herein, I have this day signed this Bill of Exceptions.

In Witness Whereof, I have hereunto set my hand this 8th day of September, 1942.

JOHN C. BOWEN

Judge of the District Court
of the United States.

Copy Received, August 31, 1942.

G. D. HILE

Asst. United States Attorney.

The foregoing is expressly approved by all parties herein.

ALBERT D. ROSELLINI

Atty. for Appellant

G. D. HILE

Atty. for Appellee

[Endorsed]: Filed Sep. 8, 1942.

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Comes Now the appellant, James Nathan Lowery, by his attorney, Albert D. Rosellini, and in conformity to the Court's order that Assignments of Error be served and filed on or before the 31st day of August, 1942, and in connection with appellant's appeal herein, makes the following Assignments of Errors, upon which appellant will

rely in the prosecution of his appeal herein, to-wit:

1. That the Court erred in denying Appellant's motion to suppress the evidence and exhibits in the case, for the reason and upon the ground that there was an unlawful search and seizure of the person and property of the Appellant in violation of his constitutional rights.

2. The Court erred in denying Appellant's challenge to the sufficiency of the evidence at the close of the entire case, and in the refusal of the Court to dismiss Count Two of the Indictment upon the ground and for the reason that all of the evidence in the case was obtained by means of unlawful search and seizure of the person and property of the Appellant.

ALBERT D. ROSELLINI

Attorney for Appellant.

Office and Post Office Address: 1111 Smith Tower, Seattle, Washington.

Copy Received, Aug. 31, 1942.

G. D. HILE

Assistant United States

Attorney.

[Endorsed]: Filed Aug. 31, 1942.

[Endorsed]: No. 10211. United States Circuit Court of Appeals for the Ninth Circuit. James Nathan Lowery, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed September 17, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.